IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 8

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees.*

On Appeal from the United States District Court for the District of Columbia

REPLY OF APPELLANTS TO BRIEFS OF APPELLEES

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Because of what we view as a substantial change of position by the Interstate Commerce Commission in its brief to this Court on the issue presented by this appeal from the position taken by the Commission in its decision under review, we believe this reply brief is desirable if confusion of the real issue involved and the

position of the opposing parties thereon is to be avoided.

In this discussion specific attention will be given only to the brief of the Interstate Commerce Commission since there is nothing in the briefs of the other appellees[1] which requires argument additional to that already made in our principal brief.

I.

CONTRARY TO THE COMMISSION'S CONTENTION, THIS APPEAL DOES NOT INVOLVE THE ISSUE OF WHAT SPECIFIC RESTRICTIONS SHOULD HAVE BEEN IMPOSED BY THE COMMISSION UPON MOTOR TRANSIT'S OPERATIONS, BUT ONLY THE ISSUE OF WHETHER UNRESTRICTED OPERATING AUTHORITY MAY BE GRANTED TO A RAILROAD-CONTROLLED MOTOR CARRIER IN VIOLATION OF SPECIFIC STATUTORY LIMITATIONS CONTAINED IN SECTION 5(2)(b) OF THE INTERSTATE COMMERCE ACT.

This proceeding involves a grant of unrestricted operating authority by the Interstate Commerce Commission to a railroad-controlled motor carrier without making the findings required by the proviso of Section 5(2)(b) of the Interstate Commerce Act. By such action the Commission has removed all restrictions which it had previously imposed upon appellee Rock Island Motor Transit Company (herein called Motor Transit) in acquisition proceedings under Section 213 and 5(2)(b) of the Interstate Commerce Act.

[1] With respect to the statutory defendant, the United States of America, however, it is significant to note that the Solicitor General has not seen fit to file a brief with the Court in defense of the Commission's decision and order or in support of the judgment below.

Accordingly, the precise basic issue raised by this appeal is whether the Commission can grant such unrestricted motor carrier operating rights *without finding* not only that they are consistent with the public interest and will not unduly restrain competition but also that the resulting operations will enable the parent railroad to use service by motor vehicle to public advantage "in its operations" as required by the proviso of Section 5(2)(b). In its brief to this Court (p. 18) the Commission has confused this issue and misstated our position on it by stating that appellants are contending that the Commission is required to impose certain specific conditions which would transgress upon the discretion which the Commission has under the statute with respect to what conditions are required to meet the statutory standards. In fact, the Commission appears to go so far as to suggest that it has complied with the requirements of Section 5(2)(b) in granting Motor Transit an unrestricted motor carrier certificate between the points involved because such statutory restrictions are not offended where the Commission seeks to meet what it regards as special transportation needs in the public interest (p. 19).

The basic issue before the Court cannot be so easily avoided. We are not here concerned with what specific conditions or particular limitations must be imposed to meet the requirements of the proviso of Section 5(2)(b). We concede that such considerations are within the discretion of the Commission if based upon the evidence before it. But we are concerned with the question of whether the Commission can, as it purports to do in its decision under review, completely ignore specific statutory

limitations contained in Section 5(2)(b) and make no findings thereon simply because the application was filed under Section 207 instead of Section 5, even though the applicant's avowed objective is to avoid restrictions previously imposed on the same carrier over the same routes in acquisition proceedings.[2]

There can be no question but that the Commission did not make the findings required by the proviso of Section 5(2)(b) but expressly refused to do so (R. 105-108).[3] It found instead only that the unrestricted operations were required by the present and future public convenience and necessity (R. 116).

In our principal brief to this Court, appellants equated the statutory requirement contained in the proviso to Section 5(2)(b)—that the transaction proposed will enable the parent railroad to use service by motor vehicle "in its operations"—with a general limitation that the motor carrier's operations should be auxiliary to or supplemental of the parent railroad's train service. We have done so because the Commission has consistently thus interpreted this statutory language, has never suggested any alternative construction, and in this case repre-

[2] See our principal brief pp. 22-23.

[3] After discussion of the contentions of the parties opposing the application of Motor Transit that the authority requested was subject to the provisions of Section 5(2)(b) of the Act, and stating that it did not subscribe to this view (R. 105), the Commission said (R. 106): "In other words, we may issue certificates to motor-carrier affiliates of railroads with or without restrictions as the circumstances may require."

sented to the District Court, which it adopted, that such was the correct statutory interpretation.[4]

We do not agree with the basic premise advanced in the Commission's decision and the contention continually stressed in the Commission's brief, that the determination of whether unrestricted operations of a railroad's motor carrier subsidiary should be authorized pursuant to an application under Section 207 of the Act, rests upon findings that there is a public need for the service sought and that it will not unduly restrain competition. Clearly omitted from consideration is the relationship of the proposed service to the operations of the railroad and the question of whether the motor service will be auxiliary to or supplemental of the rail operations. This is the crux of the question presented for determination, and no amount of argument by the Commission that it has in substance met the requirements of Section 5(2)(b) could be persuasive in the absence of a finding with respect to this particular statutory requirement. Indeed, the grant by the Commission of "unrestricted" authority is the antithesis of service restricted to operations in conjunction with the railroad. Consequently, the

[4] This is evidenced by the finding of the District Court—to which the Commission has taken no exception—reading as follows (R. 193):

> "It is agreed that the requirement that the service be used in the operation of the railroad applicant means that the service must be auxiliary to or supplementary to the rail service."

However, even if such construction of the statutory language was debatable, it would in no way affect the issue before the Court as to whether or not the Commission made findings necessary to support its decision and order in this case because the Commission clearly decided that the provisions of the proviso of Section 5(2)(b) were not binding upon it in a Section 207 proceeding.

Commission is squarely faced with the necessity of demonstrating to the Court that in passing upon a Section 207 application by a rail-controlled motor carrier it need not comply with the requirements set forth in Section 5(2)(b). Actually, that is the position taken in the Commission's decision under review as distinguished from the brief which it has filed in defense of that decision.

II.

THE COMMISSION CANNOT REMOVE RESTRICTIONS SPECIFICALLY REQUIRED BY AND IMPOSED UNDER SECTION 5(2)(b) IN ACQUISITION PROCEEDINGS SIMPLY BY ENTERTAINING AN APPLICATION UNDER SECTION 207 AND EXERCISING ITS DISCRETION.

The Commission makes only one principal argument[5] in its brief in support of its construction of

[5] A subsidiary contention is made with respect to the Civil Aeronautics Act. In footnote 6, pp. 62 and 63 of its brief, the Commission cites the Civil Aeronautics Board as supporting its view. The decision in *American President Lines Petition*, 7 C.A.B. 799, to which the Commission refers, is predicated upon the fact that the certificate provisions of the Civil Aeronautics Act (Section 401) do not include the requirements of the acquisition section (Section 408) *and* that Section 2 defines the standard of "public convenience and necessity" found in Section 401 in a way that does not include the acquisition standards (p. 802). No such limitation upon the definition of "public convenience and necessity" as found in Section 207 of the Interstate Commerce Act is set forth in other sections of that statute. To the contrary, the National Transportation Policy, as previously interpreted by the Commission, requires the application of the standards of Section 5(2)(b) in determining "public convenience and necessity" under Section 207 (Appellants' Br. p. 16). Moreover, since the CAB requires approval under Section 408 of the relationship between a surface carrier and a subsidiary during or immediately after certificate proceedings, the practical fact is that no surface carrier is today engaged in air operations either by itself or through a subsidiary. Nor does the CAB condone the type of statutory evasion here involved. (Appellants' Br. pp. 26-28)

Section 207 not already covered in our principal brief or that of appellants in Case No. 6. This argument is stated as follows (I.C.C. Br. p. 23):

> "Where a railroad or its affiliate acquires by purchase or merger an existing motor carrier, there is lost the actual or potential competition between the railroad and the previously independent motor carrier. However, where a railroad or its affiliate undertakes to commence or expand its own motor carrier service, it can only do so in *added* competition with independent motor carriers already in the field."

There are at least three answers to this argument. First, the Commission made diametrically the opposite argument to this Court in successfully defending its decision and order in *United States* v. *Texas & Pacific Motor Transport Company*, 340 U.S. 450, when it stated:[6]

> ". . . Although section 213 (now sec. 5) deals with the acquisition of existing motor carrier operations, which, as acquired by railroad subsidiaries, would presumably be taken out of the field of independent existing competition, nevertheless, *the purpose of Congress' transportation policy, declared when enacting the Motor Carrier Act, refute any inference that Congress, while closing the door to railroad suppression of motor carrier competition by means of acquiring through a subsidiary existing motor carrier operations, at the same time left open the unfettered opportunity to do the same thing by means of obtaining through a subsidiary authority to institute new*

[6] Pages 53 and 55 of the joint brief for the United States and the Commission (See pp. 25 and 26 of the brief of appellants in Case No. 6).

motor carrier operations. So far as opportunity for suppression of competition is concerned, there is little difference, particularly in the motor carrier field, between the opportunity afforded through the control by a railroad of an already existing motor carrier and that afforded by control of one newly created." (Italics supplied.)

Second, the argument is predicated upon an assumption that the purpose of the proviso of Section 5(2)(b) is entirely to maintain competition and prevent a monopoly. Such an assumption is negated by the language of the second proviso itself. That proviso requires three separate and distinct findings by the Commission. These are that the transaction proposed (a) will be consistent with the public interest, (b) will enable the railroad involved to use the service by motor vehicle to public advantage in its own operations, and (c) will not unduly restrain competition. Thus the requirement that the railroad be able to use the motor service involved to public advantage in its own operations is an absolute limitation upon the scope of rail-controlled motor services entirely separate and distinct from the effect of such services upon competition. It is, therefore, inescapable that the proviso of Section 5(2)(b) reflects a general Congressional policy to restrict and limit the participation of railroads in motor vehicle operations to situations where the railroad can use the service to public advantage in its operations as a railroad, and that the effect of such participation upon competition is an additional and separate statutory standard for the Commission to observe.

Third, one of the reasons advanced by the Commission for granting Motor Transit an unrestricted cer-

tificate in this case is that the State of Iowa has a policy of granting only monopolistic intrastate rights, and Motor Transit is the sole possessor of such authorization. (R. 114-115). Where then is the added competition of independent motor carriers of which the Commission speaks?

Both the motor carrier appellants in Case No. 6 and the railway labor organization appellants in Case No. 8 have taken the position that the Commission's action here amounts to an evasion of the statutory requirements of Section 5(2)(b) through the guise of a certificate proceeding.[7] In support of this position appellants have pointed out (a) that the routes involved were acquired by Motor Transit through purchase from independent motor carriers; (b) that the Commission, during the course of the acquisition proceedings involving such purchases, found that the requirements of Section 5(2)(b) could be met only by imposing five specific limitations designed to make the motor carrier service auxiliary to or supplemental of the train service of the Rock Island Railroad, and that the Commission's authority to so act was sustained by this Court; (c) that Motor Transit upon advice of new counsel then filed an application under Section 207 for the same routes without such restrictions; (d) that both the Examiner and the Commission found that the proceedings on the new application were merely another phase of the original acquisition proceedings and that the issues before the agency were those with which it was faced in the reopened acquisi-

[7] Brief of American Trucking Associations, Inc., et al., Case No. 6, p. 3; Brief of Railway Labor Executives' Association, et al., Case No. 8, pp. 22-29.

tion proceedings in 1947 (R. 74, 109); (e) that the question before the Commission was thus clearly whether or not the requirements of Section 5(2)(b) could be met by the removal of the restrictions imposed by the Commission and not whether the public convenience and necessity required the grant of a new certificate to Motor Transit; and (f) that the Commission's action simply amounted to a removal of conditions imposed to meet the requirements of Section 5(2)(b) without making any finding that the operation without such restrictions met those requirements.[8]

In our view, these contentions of appellants still remain unanswered despite the Commission's last minute attempts in its brief to this Court, contrary to the position it took in its decision under review, to persuade the Court that it really has met the requirements of Section 5(2)(b) even though it is not required to do so. We submit that this shifting of position spells out more strongly than could any opposing argument the tenuous basis of the Commission's decision and order in this particular case.

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[8] Appellants' contentions have been reinforced by the brief of the Interstate Commerce Commission which states at pp. 7 and 8 that the routes and points applied for are set forth on a map attached as Appendix A. Reference to that map shows that these routes and points are a part of the "White Line Route" and the "Frederickson Route" which were originally purchased from carriers of those names, and by the statement at p. 7 of Motor Transit's brief that its application in the present case was "for permanent authority to perform motor carrier service over the White Line and Frederickson Routes."

CONCLUSION

The judgment of the District Court should be reversed and the Commission's order declared invalid because it is not based upon findings required by the Interstate Commerce Act.

Respectfully submitted,

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